80-725

Supreme Court, U.S.
FILED
NOV 1 1980
MICHAEL RODAK, JR., CLERK

CASE NO._____

UNITED STATES SUPREME COURT

OCTOBER 1980 TERM

JAMES SHELTON ~~AND UNIVERSITY VILLAGE MUSIC CENTER, A BUSINESS,~~

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

# PETITION FOR CERTIORARI

FOR PETITIONER:

JAMES SHELTON
Attorney Pro Se
4733 Village Pl.N.E.
Seattle, Wa. 98105
206-525-6200

FOR RESPONENT:

R.M. TAYLOR AUSA
10th Floor
U.S.Courthouse
Seattle
Wash. 98104

## QUESTIONS PRESENTED FOR REVIEW

1. IS UNITED STATES AS A DEFENDANT REQUIRED TO ANSWER A COMPLAINT SAME AS ANYONE ELSE?

2. WHERE THERE HAS BEEN NO ANSWER AND THE CASE HAS NOT REACHED TRIAL STAGE IS A DEMURRER ALLOWED UNDER THE RULES?

3. DOES IMMUNITY FROM TORT SUITS UNDER 28 USC 2680 (c) APPLY TO "JUST COMPENSATION" CLAUSES OF V AMENDMENT OF UNITED STATES CONSTITUTION?

## PARTIES

PETITIONER: James Shelton doing business as University Village Music Center.
RESPONDENT: United States of America.

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## GROUNDS FOR JURISDICTION

On 21 July 1980 Ninth Circuit Court filed and entered Judgment which affirmed the District Court's judgment. No re-hearing was requested.

United States Supreme Court Rule 19 (b), 28 USC and 28 USC 2101 (c) confer on this Court jurisdiction to review this judgment by writ of certiorari.

## STATUTES AND PROVISIONS OF THE CASE

Federal Rules Of Civil Procedure Rule 7 (a), 28 USC.

> Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be a-llowed, except that the court

> may order a reply to an answer or a third-party answer.

Federal Rules Of Civil Procedure Rule 7 (c), 28 USC.

> Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

The Constitution, Amendment Five.

> No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 USC 2680 (c) The provisions of this chapter and section 1346 (b) of this title shall not apply to-

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the

> detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

The Constitution, Amendment One.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free excise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

Plaintiff/Petitioner, hereinafter known as Owner, owns and operates a small family music store in Seattle, Washington.

A dispute arose over the price and duty of a guitar which had been shipped to Owner from Europe.

The United States Agency involved, hereinafter known as User, decided therefor to hold a proceeding "To Appear, To Testify, and To Produce Documents" using

Citation Form 3115. The form designated Owner's address as "Place" for the proceeding and the proceeding was held on the date, time and place listed on the form.

Owner filed a Complaint in District Court citing V Amendment "private property shall not be taken for public use, without just compensation".

The Complaint was never answered although User applied for and recieved an extention of time to Answer. User subsequently demurred from the complaint via a motion to dismiss. It was Owner's position that this motior was in effect a general demurrer and not seasonable where there was no Answer and the case was not yet at trial stages.

Owner, therefore, appealed the matter to Ninth Circuit Court of Appeals. The Ninth Circuit Affirmed the District Court judgment based on 28 USC 2680 (c)

citing Morris v. United States 521 F.2d 872 (9th Cir. 1975). The Ninth Circuit Court memorandum did not address the question of V Amendment rights or the question of demurrer and default where the User failed to Answer, although these issues were presented.

Summary of the events in the case are as follows:

1. On 14 February 1978 a Complaint was filed when Owner's property was used for a Governmental Proceeding. The event was documented and attached to the Complaint as exhibit 'A'.

2. User had problems answering the well documented complaint and an extension of time to answer was therefore agreed to by Owner on 26 April 1978.

3. Subsequently, on 21 June 1978 User demurrered from the Complaint based on a variety of theories, one of which was 28 USC 2680 (c) "that the agents were

collecting taxes or duty" at the time.

4. The District Court's judgment on 1 September 1978 was that it lacked jurisdiction and that the User was immune from tort suits based on 28 USC 2680(c), supra, and the District Court therefore dismissed the Complaint.

5. On 14 November 1978 District Court granted Owner extension of time to file notice of appeal.

6. On 28 November 1978 Owner appealed the matter to the Ninth Circuit Court based on User's lack of an Answer and a lack of foundation for the User's demurrer motion and the facts thereof to rest.

7. On 21 July 1980 the Ninth Circuit Court upheld the District Court's Judgment based on 28 USC 2680 (c).

The bases for Federal jurisdiction in first instance was use of United States Agency Citation form 3115 "Citation To Appear, To Testify, and To Pro-

duce Documents". The form cites sections 509, 510, and 511 of the Tariff Act of 1930 as authority on its face. The Citation form was attached to the Complaint, jurisdiction EnterAlia 28 USC 1346.

## ARGUMENT FOR THE WRIT

When the United States is a defendant the Ninth Circuit Court no longer requires an Answer to Complaints. Moreover, the Ninth Circuit is allowing demurrers even though demurrers have been abolished and outlawed by this high Court, and are not allowed in other Circuits.

The Ninth Circuit decision is in conflict with other Circuits on this matter and has sanctioned departure so far from the accepted and usual course of judicial proceedings by the lower court as to call for exercise of this Court's

power of supervision.

Aside from the 'no Answer' aspect, the Writ of Certiorari should be allowed because other circuits have held demurrer even when guised as motion to dismiss are prohibited by Federal Rules of Civil Procedure, Rule 7 (c), 28 USC. Olan Mills, Inc. v. Enterprise Publishing Co. 210 F2d 895:

> In a defamation suit, a defendant's claim of privilege cannot be availof by a motion to dismiss, but must be pleaded by answer, since pleas are abolished under FRCP.

Demurrers are abolished: De Louch v. Crowley's Inc. 128 F2d 378, C.C.A Fla. A general demurrer has no standing in Federal Court either under its own name or under the disarming alias of a motion to dismiss: Tobin v. Chambers Constr.Co. 15 FRD 47..

User's motion to dismiss effectively shuts off Owner's right to reply or to amend in respect to User's Answer, and

yet eventhough User has never Answered he has nevertheless somehow obtained a dismissal!

The Ninth Circuit ruling if left standing would give persons far and wide an impression that the United States need not even answer a complaint, even-though FRCP Rule 7 (a) states "there shall be a complaint and an answer". Moreover, lack of a timely answer is ordinarily a default under the Rules.

The pleadings are not closed until at least an answer has been filed: Creedon v. Bowman 75 F.Supp. 265; Royal Petreleum Corp. v. Smith 127 F2d 841.

A motion is not a pleading: Bigelow v. RKO Radio Pictures 16 F.R.D. 15. The place that this rule relating to dismiss-al of actions occupies in the numerical order of rules, as part of chapter en-titled "trials", tends to characterize the rule primarily as controlling the

action at or after trial: Russo v.Sofia Bros. 2 F.R.D. 80.

The court below actually dismissed this matter in error. The sanction of dismissal is the most severe sanction that the court may apply, and its use must be tempered by careful exercise of judicial discretion: Durgin v. Graham C.A. Fla. 1967, 372 F.2d 130. certiorari denied 87 S.Ct 2139, 388 U.S. 919, 18 L. Ed2d 1365. Durham v. Florida East Coast Ry. Co., 385 F.2d 366, C.A. Fla. 1967.

Owner, himself, would not feel nearly so bad about this decision had the User answered the complaint. It is as if they don't even bother to Answer,where anyone else would get a Default under the Rules.

Here the Owner's rights and property were converted to Governmental use without due process. Justice Frankfurter has said: Due process expresses respect

enforced by law for that feeling of just treatment which has been evolved through American history and represents a profound attitude of fairness between man and man and more particularly between individual and government.

The lower court ruled it lacked jurisdiction and the agents were immune from tort suits under 28 USC 2680 (c). The complaint, however, cited V Amendment rights "private property may not be taken for public use without just compensation.

It is Owner's contention that Ninth Circuit gives more latitude to 28 USC 2680 (c) than other circuits, but even assuming immunity from tort suits under that statute the User still violated V Amendment rights by not justly compensating Owner for use of his property.

The 28 USC 2680 (c) statute Question could not override the given V Amendment rights for property use compensation

because of the First Amendment clauses, and the court's judgment should therefore be settled on this issue.

It should be noted that other circuits have awarded many judgments in this respect, notably:

R.J. Widen Co. v. U.S., 1966, 357 F2d 988

> To constitute "taking" under this amendment, it is not necessary that property be absolutely taken in the narrow sense of that word to come within protection of constitutional provision, and it sufficient if action by government involves direct interference.

Cayon v. City of Chicopee, 1971, 277 N.E. 2d 116.

> Substantial interference with use and enjoyment of private property constitutes a "taking".

Sun Oil Co. v. U.S., 1978, 572 F2d 786.

> Fact that a taking is temporary, as contrasted with a permanent taking, is of no consequence in law of federal eminent domain.

Therefore, the District Court opinion on 28 USC 2680 (c) gives far more latitude to that statute than is written

in the statute or is given by other circuits. I have not found any other court decisions which barred "just compensation" clauses based on 28 USC 2680 (c).

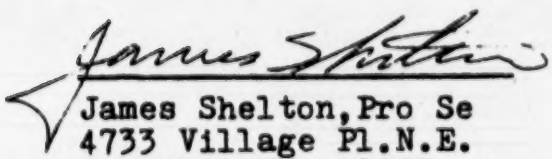
The Ninth Circuit opinion, therefore gives tacid approval of the taking of private property for public use without compensation. It would therefore seem of interest for this Court to review this question and provide guidance to the lower courts. But in any case pleadings are not closed until at least an answer has been filed. Williams v. Walnut Park Plaza, Inc., 1946, 68 F. Supp 957; Creedon v. Bowman, 1948, 75 F. Supp 265.

The complaint clearly states V Amendment violation. The violation is not denied and is clearly documented and the documentation is attached to the complaint as exhibit 'A'.

Since the question is a constitution one and the User violated the Federal

Rules of Civil Procedure which were formulated by this Court, it would seem the Court would be interested in reviewing the matter. However, the case only involves a small family music store matter and may not warrant distracting the Court from other more important matters of State.

Respectfully Submitted,



James Shelton, Pro Se
4733 Village Pl.N.E.
Seattle, Wa. 98105
206-525-6200

DO NOT PUBLISH

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES SHELTON and UNIVERSITY VILLAGE MUSIC CENTER, a business,
*Plaintiff-Appellant,*

vs.

UNITED STATES OF AMERICA,
*Defendant-Appellee.*

No. 78-3695

MEMORANDUM

Submitted — June 30, 1980

Decided — July 21, 1980

Appeal from the United States District Court
for the Western District of Washington
Morell E. Sharp, District Judge, presiding

Before: GOODWIN, POOLE and FERGUSON, Circuit Judges.

The claim of the plaintiff that the government is liable for the alleged tortious conduct of agents of the Customs Service occurring in the course of an investigation concerning Shelton's importation of a guitar is without merit.

Plaintiff's action is barred by 28 U.S.C. § 2680(c), which provides that a claim arising in respect to the assessment or collection of any tax or customs duty is exempt from the provisions of the Federal Tort Claims Act. *See Morris v. United States*, 521 F.2d 872 (9th Cir. 1975), involving the exemption of Internal Revenue Service agents under § 2680(c).

The judgment is AFFIRMED.

RECORDER SUNSET PRESS, SAN FRANCISCO, CA 7-31-80—500

C78-104S

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES SHELTON, and University Village Music Center, a business,

Plaintiffs,

V.

UNITED STATES OF AMERICA,

Defendant.

---

ORDER OF DISMISSAL

This cause comes before the Court on defendant's motion for an order dismissing the action or, in the alternatime, for an order of summary judgment. Having reviewed the memoranda of the parties, the pleadings and the file herein, and being fully advised, the Court rules as follows:

Defendant's motion for dismissal is GRANTED. Plaintiff James Shelton seeks damages for the alleged tortious conduct of the United States Customs Service and certain of its agents occurring in the course of an investigation concerning

plaintiff's importation of a Spanish guitar. Plaintiff's claims against the United States arise in respect of the assessment and collection of customs duty. The United States is immune to s such claims. 28 U.S.C. 2680 (c). Because this Court lacks subject matter jurisdiction of plaintiff's complaint, the complaint is hereby DISMISSED with prejudice.

IT IS SO ORDERED.

The Clerk of this Court is instructed to enter judgment accordingly and to send uncertified copies of this Order and of the judgment to the plaintiff James Shelton, appearing pro se herein, and to counsel for the defendant.

DATED at Seattle, Washington, this 31st day of August, 1978.

(Morell E. Sharp)
UNITED STATES DISTRICT JUDGE

(Filed 1 September 1978)

C78-104S

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES SHELTON, and University Village Music Center, a business,

Plaintiff,

V.

UNITED STATES OF AMERICA,

Defendant.

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JUDGMENT

This matter having come on for consideration before the Court, Honorable Morell E. Sharp, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED, that defendant's motion for dismissal is GRANTED. Plaintiff's complaint is herewith DISMISSED with prejudice.

DATED THIS (31st) day of (August), 1978

(Betty Fleming)
Deputy United States
District Clerk

(Filed 1 September 1978)

## CERTIFICATE OF SERVICE

James Shelton, being first duly sworn, hereby certifies that 40 copies of petition for certiorari were filed within the permitted time by placing same in United States Mail on 10 October 1980 and that 4 copies were served on Respondent by placing in United States Mail properly stamped and addressed to: Solicitor General, Department of Justice, Washington D.C. 20530 on 10 October 1980.

James Shelton

SUBSCRIBED AND SWORN to before me this 23 day of September 1980.

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.